

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

ERIK J. VICARIO,  
Plaintiff,

V.

FERNANDO MACK,  
Defendant .

CASE NO. 1:16 CV 2911

JUDGE CHRISTOPHER A. BOYKO

MEMORANDUM OF OPINION  
AND ORDER

On December 2, 2016, Plaintiff *pro se* Erik J. Vicario filed this *in forma pauperis* action under 42 U.S.C. § 1983 against Defendant Attorney Fernando Mack. Plaintiff alleges he retained Defendant to represent him in a pending criminal case, but that Defendant has not provided adequate representation. Plaintiff seeks his release from pre-trial incarceration, dismissal of the criminal charges against him, and \$1.5 million in damages.

Although *pro se* pleadings are liberally construed, *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam), the district court is required to dismiss an action under 28 U.S.C. § 1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact.<sup>1</sup> *Neitzke v. Williams*, 490 U.S. 319 (1989); *Hill v. Lappin*, 630 F.3d 468, 470 (6<sup>th</sup> Cir. 2010).

<sup>1</sup> An *in forma pauperis* claim may be dismissed *sua sponte*, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S.C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. *Chase Manhattan Mortg. Corp. v. Smith*, 507 F.3d 910, 915 (6<sup>th</sup> Cir. 2007); *Gibson v. R.G. Smith Co.*, 915 F.2d 260, 261 (6<sup>th</sup> Cir. 1990); *Harris v. Johnson*, 784 F.2d 222, 224 (6<sup>th</sup> Cir. 1986).

A criminal defense attorney who acts in that capacity on behalf of a criminal defendant does not act under color of state law for purposes of a 42 U.S.C. § 1983 action. *Polk County v. Dodson*, 454 U.S. 312 (1981); *Deas v. Potts*, 547 F.2d 800 (4th Cir. 1976). Further, to the extent Plaintiff seeks to challenge his current confinement, he must seek relief in habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)

Accordingly, this action is dismissed under 28 U.S.C. § 1915(e). The dismissal is without prejudice to any valid state law claim Plaintiff may have under the facts alleged. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(A)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

s/ Christopher A. Boyko  
CHRISTOPHER A. BOYKO  
UNITED STATES DISTRICT JUDGE

DATED: January 12, 2017